UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

SENAH, INC,

Plaintiff,

v.

XI'AN FORSTAR S&T CO, LTD,

Defendant.

Case No. 5:13-cv-04254-BLF (HRL)

ORDER RE DISCOVERY DISPUTE JOINT REPORT NO. 1

Re: Dkt. No. 92

The opening sentence of the undersigned's Standing Order re: Civil Discovery Disputes (Standing Order) states: "The parties and counsel are cautioned not to allow discovery disagreements to drag on unresolved until some important looming deadline forces them into action." Standing Order, Section 1. Additionally, the Standing Order provides that "[t]o avoid needless complexity and unwieldiness, the Joint Report should deal with only one issue (or, at most, a few inextricably related issues)." Id., Section D.ii. Nevertheless, the parties did not conduct their in-person meet-and-confer about the discovery at issue until nearly two weeks after fact discovery closed. And, on June 16, 2015, the asserted deadline for requesting orders compelling discovery (more about this below), the parties jointly filed Discovery Dispute Joint Report (DDJR) No. 1, an omnibus report pertaining to a raft of discovery requested by both sides in this litigation, including requests for admission, interrogatories, and document requests. Despite the questionable compliance with the undersigned's Standing Order, this court attempts to

resolve each dispute as fairly as circumstances permit.[1]

As discussed in this court's order re plaintiff's DDJR Nos. 2 and 3, the instant DDJR appears to be untimely. Pursuant to this district's Civil Local Rules and this court's Standing Order, DDJRs may not be filed more than 7 days after the discovery cutoff. Civ. L.R. 37-3; Standing Order, Section D. The discovery cutoff in this case was May 30, 2015. Dkt. 57. May 30 was a Saturday; and, giving the parties the benefit of Fed. R. Civ. P. 6(a), the following Monday, June 1 is treated as the actual discovery cutoff. Any DDJRs re fact discovery therefore should have been filed no later than June 8. DDJR No. 1 was filed over a week too late. The parties claim that the June 16 filing deadline was set by stipulation and order, but they direct this court's attention only to their stipulation and proposed order in which they agreed to that deadline. See Dkt. No. 57. It is not apparent from the docket that Judge Freeman entered an order approving that proposed deadline. Nor is there any indication in her Case Management Order that she contemplated setting a deadline for filing discovery motions different from that set by the court's Civil Local Rules. See Dkt. 53. Absent a court order, and with certain exceptions not applicable here, parties cannot stipulate around deadlines for matters that are required to be filed with the court. Civ. L.R. 6-1(b).

Nevertheless, accepting the asserted June 16 deadline for filing DDJRs, this court has considered the merits of DDJR No. 1 and the parties' respective arguments. The court now rules as follows:

I. DEFENDANT'S DISCOVERY REQUESTS

A. Requests for Admission (RFAs) Nos. 2-29

Plaintiff initially responded to these RFAs on May 26, 2015 by denying RFA No. 1 and objecting to the rest on the sole ground that defendant had exceeded the presumptive limit on the number of *interrogatories* that may be served. DDJR No. 1, Ex. A. By the time the parties met-and-conferred about these requests on June 11, however, defendant says that plaintiff acknowledged that this objection was improper. Defendant says that plaintiff agreed to serve

[1] DDJR No. 1 is deemed suitable for determination without oral argument. Civ. L.R. 7-1(b).

supplemental responses by June 12, but did not actually do so until June 15, flatly denying each and every RFA.[2]

Defendant now requests an order deeming the matters in RFAs 2-29 admitted because, even assuming plaintiff's denials are truthful, defendant says that plaintiff initially stalled on its responses with a frivolous objection. Alternatively, defendant requests that it be allowed to re-open and resume the depositions of plaintiff's witnesses for the purpose of exploring the basis for plaintiff's complete denials. Defendant says that this is necessary because plaintiff reportedly has denied matters that its own witnesses admitted in deposition.

A party answering RFAs must respond with an admission, a denial, or a detailed statement why the matter (or portions of it) cannot truthfully be admitted or denied. Fed. R. Civ. P. 36(a)(4). On a motion to determine the sufficiency of an answer or objection to an RFA, "[u]nless the court finds an objection justified, it must order that an answer be served." Fed. R. Civ. P. 36(a)(6). "On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served." Id.

There being no limit on the number of RFAs that can be propounded, plaintiff's initial objection to RFAs 2-29 was unjustified and nonsensical. Nevertheless, it subsequently answered the RFAs at issue, completely denying each of the matters in question. Although defendant questions the veracity of plaintiff's denials, that is not a matter this court can resolve on this DDJR. See Schwarzer, et al., California: Federal Civil Procedure Before Trial § 11:2074 (Rev. #1 2008) ("If the request is completely denied, a motion to determine the sufficiency of the denial is improper. The truth of the matter must be proved at trial, whereafter the discovering party's only remedy is to move for payment of the expenses of such proof."). Defendant's request for an order re-opening fact discovery for the purpose of re-examining plaintiff's witnesses is denied. The record presented indicates that the parties conducted many of their discovery activities late in the discovery period. There is no indication how many witnesses defendant seeks to re-depose or

[2] The parties did not submit a copy of plaintiff's supplemental responses to the subject RFAs. But, there being no dispute as to the nature of those responses, this court takes the parties at their word.

for how long. And, in any event, re-opening discovery at this stage in the proceedings (even for a limited purpose) appears likely to derail the schedule set by Judge Freeman, which sets an August 13, 2015 dispositive motion hearing deadline and a trial to begin later this fall. Dkt. 53.

Defendant's requested relief with respect to RFAs 2-29 is denied.

B. Interrogatory No. 25

Defendant's Interrogatory No. 25 asks: "For each request for admission served simultaneously with these interrogatories for which YOUR response is anything but an unqualified admission, state all facts upon which YOU base YOUR response." DDJR No. 1, Ex. B. Plaintiff answered with respect to RFA No. 1, but refused to answer as to RFA Nos. 2-29 on the ground that responding as to those RFAs would exceed the permissible limit on interrogatories defendant may serve. Id. Defendant now requests an order either deeming the matters requested in RFAs 2-29 admitted, or alternatively, compelling plaintiff to answer Interrogatory No. 25 as to the basis for its denial of the matters in RFAs 2-29.

For the reasons discussed above, the court denies defendant's renewed request to deem RFAs 2-29 admitted.

Even so, for the reasons stated below, the court grants defendant's alternate request for an order compelling plaintiff to answer this interrogatory as pertains to those RFAs.

Interrogatory No. 25, which seeks the basis for denials in RFAs 2-29, is construed as an interrogatory with subparts, meaning that it is treated as being as many interrogatories as there are RFAs. Safeco of America v. Rawstron, 181 F.R.D. 441, 445 (C.D. Cal. 1998). The RFAs in question cover various discrete subjects. See DDJR No. 1, Ex. A. Defendant therefore exceeded the presumptive limit on interrogatories that may be served. Fed. R. Civ. P. 33(a)(1) (providing that a party may serve no more than 25 interrogatories on any other party).

Nevertheless, this court has the authority to alter the presumptive limit on interrogatories "to the extent consistent with Rule 26(b)(2)," Fed. R. Civ. P. 33(a)(1), and it finds good cause to do so here. As discussed above, plaintiff's initial (and sole) objection to RFAs 2-29 based on the presumptive limit for interrogatories was baseless. Plaintiff now simply argues that its denials of the matters asserted in RFAs 2-29 may be addressed at deposition---conveniently ignoring that

fact discovery closed weeks ago. Each of these RFAs appear to pertain to matters relevant to key issues in dispute in this litigation. The probative value of the discovery therefore is high and outweighs any burden that might be imposed. Plaintiff fairly should be made to explain the basis for its denials. Within 10 days from the date of this order, plaintiff shall serve its answers to Interrogatory No. 25 with respect to its denials of the matters in RFAs 2-29.

C. Interrogatories 2-5, 8-9, 11-13, and 22-23

According to defendant, plaintiff's initial responses to these interrogatories was inadequate, and plaintiff agreed to supplement. Then, defendant claims, plaintiff sent an email on June 15, changing its mind about supplementation and arguing that defendant would have to obtain leave of court to serve more than the presumptive limit on interrogatories. Defendant correctly notes that any such concerns should not impact these interrogatories, which are within the presumptive limit. And, in DDJR No. 1, plaintiff now says that it is in the process of supplementing its responses to these interrogatories. Plaintiff is ordered to serve those supplemental responses within 10 days from the date of this order.

D. Defendant's Requests for Production

No particular requests are identified here. The only apparent issue is that plaintiff agreed to produce documents responsive to defendant's requests, but still has not done so. In the DDJR, plaintiff says only that it has "begun" to produce documents. Why, at this late stage of the litigation and weeks after the close of discovery, has plaintiff's document production only just "begun"? Nevertheless, there being no dispute that plaintiff should produce responsive documents, plaintiff shall complete its production within 10 days from the date of this order.

E. Defendant's request for a protective order

The parties have not managed to agree on the terms of a suitable protective order. They apparently have been conferring over the terms of a protective order since at least October 2014. The following month, Judge Freeman specifically directed defendant to bring the matter to this court's attention in compliance with the undersigned's Standing Order. Dkt. 66. Defendant never did so---until now. It is unclear why defendant apparently allowed this issue to languish, bringing it before this court for the first time weeks *after* fact discovery closed. Defendant's delay in

raising the issue for resolution is particularly incomprehensible, in view of defendant's assertions that the lack of a protective order has hampered discovery efforts.

In any event, as presented in DDJR No. 1, the problem is this: Defendant wants a protective order that allows both sides to designate confidential information; but plaintiff insists on a protective order that allows only plaintiff to designate information, contending that none of defendant's information warrants protection. This court is unpersuaded that defendant should be precluded from designating documents at all. Plaintiff's request for entry of a unilateral protective order therefore is denied, and the court will enter defendant's proposed order, with some modification. This ruling should not, however, be construed as an order either approving or disapproving the anticipated designation of any particular document or matter, the record presented being utterly insufficient for this court to make any determinations as to specific records or categories of information.[3]

II. PLAINTIFF'S DISCOVERY REQUESTS

A. Interrogatory No. 2

Plaintiff's Interrogatory No. 2 asks defendant to: "Please state YOUR accrual basis worldwide income for each of the past eight fiscal years. (Per contract Ex E of Aug 7, 2004, PLAINTIFF is conclusively presumed to be the procuring cause of sales outside its territory, and DEFENDANT is contractually obligated to pay PLAINTIFF a commission of twenty percent (20%) on 1) PLAINTIFF'S own sales within PLAINTIFF'S territory and 2) a commission of 20% on sales made by DEFENDANT in PLAINTIFF'S territory, and 3) a commission of 20% as the conclusively presumed procuring cause on all sales outside of [PLAINTIFF'S] Territory" (i.e. the rest of the world, a concession made by PLAINTIFF in lieu of the prior commission of 30%). PLAINTIFF asserts that the contract of August 7, 2004 was not voided and therefore PLAINTIFF

[3] Although fact discovery closed nearly a month ago, there is a suggestion that the parties---who apparently have not managed to agree on much of anything concerning a protective order---might now bring a host of disputes before this court concerning confidentiality designations. If that should happen, and given the recent barrage of eleventh-hour discovery disputes and the past failures of the parties to revolve their disputes informally, the parties may wish to seriously consider whether it might be appropriate for a Special Master to be appointed to address any future disputes.

has a direct pecuniary interest on all sales within and without its territory, i.e. DEFENDANT'S worldwide sales.) DDJR No. 1, Ex. D.

As drafted, this interrogatory is argumentative. Everything after the first sentence of the request therefore is stricken. In essence, plaintiff argues that, based on its interpretation of the alleged contract at issue, it is entitled to the requested discovery. Defendant, on the other hand, maintains that the alleged contract would not entitle plaintiff "to a portion of Forstar's total income earned from its activities all around the world" and that the discovery therefore should be denied. This court is in no position to adjudicate either side's contentions as to ultimate legal issues in dispute. While defendant complains that the interrogatory is also vague and ambiguous, it apparently does have an understanding as to the information being requested. The standard for relevance being relatively low, and the scope of pretrial discovery being quite broad, defendant shall answer this interrogatory within 10 days from the date of this order. Defendant, however, will not be required to provide information beyond the 4-year statute of limitations for contract actions. Although plaintiff argues that an action for fraudulent concealment permits discovery of information going back 5 years, its fraud claim has been dismissed with prejudice.

B. Interrogatory No. 3

This interrogatory asks defendant to "[p]lease identify by YOUR part number each and every product not 'manufactured, jobbed or distributed' (as those terms are defined at California Civil Code 1738.12(a), (b), (c)) by DEFENDANT which has ever been supplied (i.e., purchased, drop shipped, consigned, or delivered as samples) to PLAINTIFF by DEFENDANT." DDJR No. 1, Ex. D. Forstar's primary objection is that this request essentially asks defendant to admit the truth of plaintiff's legal contention that the Independent Wholesale Sales Representatives Contractual Relations Act of 1990, Cal. Civ. Code §§ 1738.10, et seq. (Act) applies. Plaintiff disclaims any intent to seek a legal conclusion, but nonetheless argues that legal conclusions may be sought through requests for admission. This request, however, is an interrogatory. This court agrees that the request essentially requires defendant to accept plaintiff's legal conclusion as to the applicability of the Act. Plaintiff's request for an order compelling an answer to Interrogatory No. 3 therefore is denied.

C. Requests for Production 1 and 3

Defendant says these requests[4] were never discussed during the parties' June 11 in-person meet-and-confer. Plaintiff insists that "[t]he issues of these [requests for production] were raised by Senah and dismissed by Forstar at the June 11 meeting and were reviewed with client who was not allowed to be present." DDJR No. 1 at 9. It is unclear precisely what plaintiff means; and, the record presented indicates that there has not been sufficient meet-and-confer on these requests. Moreover, the record indicates that for Request 1, defendant agreed to produce all non-privileged, responsive documents within its custody or control. DDJR No. 1, Ex. E. To the extent plaintiff feels that defendant's response to either of these requests is deficient, plaintiff has failed to detail the basis for its contention that it is entitled to the requested discovery and to show how the proportionality and other requirements of Fed. R. Civ. P. 26(b)(2) are satisfied. Civ. L.R. 37-2. Plaintiff's request for an order compelling this discovery is denied.

SO ORDERED.

Dated: June 23, 2015

HOWARD R. LLOYD
United States Magistrate Judge

[4] Request 1 asks for "all documents identified in your responses to interrogatories." DDJR No. 1, Ex. E. Request 3 seeks "all writings between YOU and PLAINTIFF that comply with any of the terms of California Civil Code 1738.13." Id.

5:13-cv-04254-BLF Notice has been electronically mailed to:

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